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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

RUSSELL DEAN NELSON, Plaintiff and Appellant, v. LEWIS BRISBOIS BISGAARD & SMITH LLP, Defendant and Respondent.	B241334 (Los Angeles County Super. Ct. No. BC478761)

APPEAL from a judgment of the Superior Court of Los Angeles County. John L. Segal, Judge. Affirmed.

Russell Dean Nelson, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith LLP, Brittany H. Bartold, Jana I. Lubert, Steven G. Gatley, and Young Park for Defendant and Respondent.

Plaintiff and appellant Russell Dean Nelson filed a complaint against the law firm of Lewis Brisbois Bisgaard & Smith LLP (hereafter Lewis or the Lewis firm), and one of Lewis's attorneys, Steven Gatley.[1] Nelson represented himself in suing the Lewis firm. The trial court granted Lewis's special motion to strike Nelson's complaint in its entirety pursuant to the anti-SLAPP statue. (Code Civ. Proc., § 425.16.)[2] Nelson then filed the appeal we address here; he remains self-represented on appeal. We affirm.

FACTS

The Underlying Lawsuit

In 2003, Nelson fell off a ladder at work and injured his hip, leg and back. On a date not altogether ascertainable from the record, Nelson filed a worker's compensation proceeding against his employer, Marriott International, Inc. and Renaissance Hotel Management, LLC (hereafter collectively the Hotel Parties). On a date thereafter, Nelson "was denied permanent disability payments." On still another uncertain date, possibly while his worker's compensation case was still pending, Nelson "was denied the return to his employment" with the Hotel Parties.

In October 2008, Nelson filed a complaint against the Hotel Parties alleging causes of action for discrimination based on disability, failure to engage in a good faith interactive process, retaliation, wrongful termination in violation of the public policy, and failure to provide reasonable accommodations. (L.A. Super. Ct., No. PC043876.) Attorney Darryl Lucien represented Nelson in both his worker's compensation proceeding and his civil lawsuit against the Hotel Parties. The Lewis firm, by attorney Gatley, represented the Hotel Parties in Nelson's civil lawsuit.

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[1] We hereafter collectively refer to both defendants and respondents as Lewis, except as needed for clarity.

[2] All further references to section 425.16 are to Code of Civil Procedure section 425.16.

In July 2010, Nelson relieved Lucien as Nelson's attorney of record in his civil lawsuit against the Hotel Parties. Thereafter for a period of months, the Lewis firm, by Gatley and a second attorney,[3] communicated directly with Nelson.

On January 5, 2011, Lewis — by Gatley — deposed two medical doctors in Nelson's civil lawsuit against the Hotel Parties.[4] At the first deposition, which started around nine in the morning, Nelson represented himself. Shortly before the second deposition began about noon, Lucien showed up on Nelson's behalf and handed Gatley a copy of a substitution of attorney form — with no court-filing stamp — with the signatures of Lucien and Nelson, and dated as being signed on January 5, 2011. When Gatley responded that he could not recognize a substitution of attorney form which did not show that it had been filed in the trial court in Nelson's case, Lucien assured Gatley that the substitution of attorney form had been filed with the court.[5] During the second doctor's ensuing deposition, Lucien acted as Nelson's counsel in all respects, introducing himself to the doctor as Nelson's counsel, examining the doctor, and stipulating to terms at the end of the deposition. All of the deposition events took place in Nelson's presence, and Nelson said nothing to object to Lucien's representations that he was acting as Nelson's attorney of record in Nelson's case against the Hotel Parties. Based on all of the circumstances summarized here, Gatley understood that Lucien was once again acting as Nelson's attorney of record in his civil lawsuit against the Hotel Parties from January 5, 2011, forward.

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[3] The attorney was Jerry Chang. Nelson did not name Chang as a defendant in Nelson's current case, and Chang is not involved in Nelson's current appeal.

[4] As best as we can discern from the record, it appears that the two doctors had information concerning whether Nelson was disabled, and, if so, the extent of his disability. It is not clear to us whether the doctors were treating physicians, worker's compensation doctors, or designated experts.

[5] Lucien's representation to Gatley appears to have been incorrect. A copy of the substitution of attorney form, with a court file-stamp, is in the record before us on Nelson's current appeal. It is file-stamped with a date of January 12, 2011.

On January 6, 2011, Gatley delivered a letter to Lucien with a "final settlement offer" in Nelson's case against the Hotel Parties. Gatley's letter stated that the Hotel Parties were willing to settle Nelson's lawsuit for $42,500, with specified terms. On Friday, January 7, 2011, Lucien contacted Gatley and represented that he had spoken to Nelson, and that Nelson accepted the Hotel Parties' settlement offer.

On January 10, 2011, just before the start of the final status conference or the first day of trial (differing descriptions are used in the papers we see in the record), Nelson approached Gatley in the courthouse and said that he had not heard from Lucien recently, and that he did not wish to settle his case. Gatley told Nelson that he could not talk to Nelson outside of Lucien's presence because Lucien was Nelson's attorney of record. At about the same time, Lucien entered the courthouse. Gatley told Lucien about Nelson's comments, and suggested they discuss Nelson's concerns before everyone went before the trial judge. Moments later, Lucien and Nelson entered the courtroom, where Lucien informed Gatley that Nelson had agreed to settle his lawsuit against the Hotel Parties. The following proceedings ensued in open court:

> "THE COURT: All right. This is number 12 then, Russell Dean Nelson versus Renaissance Hollywood Hotel. If you'll make your appearance.
>
> "MR. LUCIEN: Darryl Lucien for the plaintiff, Mr. Russell Nelson.
>
> "[¶] . . . [¶]
>
> "MR. GATLEY: Good morning, your Honor. Steve Gatley appearing on behalf of defendants.
>
> "THE COURT: All right. Mr. Lucien says he's filed a substitution.[**6**] Has the matter been resolved?
>
> "MR. GATLEY: As far as I know, your honor."
>
> "MR. LUCIEN: Yes, it has."

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6 See footnote 5, *ante*.

"THE COURT: All right. Have you signed an agreement? Did you want to put something on the record? . . .

"MR. LUCIEN: Well, I think we have an agreement in place and I'm just waiting on the settlement documents."

In ensuing discussions, both lawyers represented that they would be circulating a settlement agreement. The trial judge agreed to set an "OSC re dismissal" with a 45-day return date, with the understanding that if the matter did indeed settle, then the parties would simply notify the court's clerk of the finalized settlement, and the court would take the OSC off calendar.

On January 11, 2011, Gatley delivered a seven-page typed settlement agreement to Lucien for Nelson's signature.

On January 12, 2011, the substitution of attorney form which had been signed by Lucien and Nelson on January 5, 2011 (*ante*), was file-stamped by the superior court's clerk's office.

On January 13, 2011, Gatley filed a notice of case settlement of Nelson's lawsuit against the Hotel Parties in the trial court. The notice indicated that a settlement agreement was being circulated "for full execution." On the same day, Lucien sent a copy of the settlement agreement, with his signature and Nelson's signature, back to Gatley.[7]

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[7] There is some conflict, mainly by way of Nelson's assertions, regarding the signed settlement agreement. The settlement agreement document reflects that Nelson signed the agreement on January 13, 2011, but in his current complaint against the Lewis firm, Nelson alleged that he signed the document in Lucien's office on January 12, 2011. Further, Nelson alleged that he saw only two pages of the settlement agreement in Lucien's office, and that Lucien assured him that the agreement would be amended to include language (shown by hand-written notes on one of the pages that Nelson saw) expressly stating that the settlement agreement would have no effect on Nelson's then-pending worker's compensation case. The signed copy of the settlement agreement does not include such language. Nelson seems to suggest that the signed settlement agreement was later used against him in his worker's compensation case.

In February 2011, the Lewis firm released the settlement funds to Lucien. Lucien then sent a settlement statement and check to Nelson, who signed the check and took possession of the money.[8]

On February 14, 2011, Lucien filed a request for dismissal of Nelson's lawsuit against the Hotel Parties. The clerk of the court entered the dismissal that same day.

On July 25, 2011, Nelson appeared without an attorney and filed a motion to set aside the dismissal of his lawsuit against the Hotel Parties. Lewis, by Gatley, opposed the motion to set aside the dismissal, proffering copies of the signed settlement agreement to show that the action had been properly settled.

At the conclusion of a hearing on August 15, 2011, the trial court denied Nelson's motion to set aside the dismissal of his lawsuit against the Hotel Parties. In the course of the exchanges at the hearing, the court explained to Nelson that it appeared that his problems were with his own counsel, not with the Lewis firm or with the Hotel Parties.

In late August 2011, Nelson, representing himself, filed a notice of appeal from the order denying his motion to set aside the dismissal of his lawsuit against the Hotel Parties. A month later, the clerk of our court notified Nelson by letter that the case records disclosed that Nelson had filed an appeal after a voluntary dismissal of his lawsuit against the Hotel Parties, and that a question therefore existed as to whether there was an appealable order or judgment in the case. The clerk's letter invited Nelson to explain why his appeal was proper. In October 2011, Nelson filed a notice of abandonment of his appeal. In November 2011, Nelson filed a motion to set aside his abandonment of his appeal and to reinstate his appeal. In January 2012, the Administrative Presiding Justice of our court denied Nelson's motion to reinstate his appeal.

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8 In his complaint in his current case, Nelson alleges that he "accepted" the money because he was under "extreme duress with his home in foreclosure."

The Current Action

In February 2012, Nelson filed a complaint against the Lewis firm and attorney Gatley, but not against his own counsel, attorney Lucien. Nelson's complaint alleged a cause of action for fraud[9] and intentional infliction of emotional distress. Nelson alleged that the settlement agreement document in his underlying lawsuit against the Hotel parties was "executed by fraud" and then fraudulently presented to the trial court as a valid settlement agreement of his underlying lawsuit. Further details of Nelson's complaint are discussed below.

The Lewis firm and Gatley together filed an anti-SLAPP motion to strike Nelson's complaint in its entirety. Nelson filed an opposition. The parties argued the merits of the motion to the trial court, and the court took the matter under submission. Later the same day, the trial court entered a minute order granting the anti-SLAPP motion.[10]

On May 11, 2012, Nelson filed an appeal from the order granting the anti-SLAPP motion.

DISCUSSION

Nelson tells our court that he tried without success to contact attorney Gatley at the Lewis firm during a time frame shortly after the events surrounding the January 2011 settlement agreement in his underlying lawsuit transpired. Nelson said he did so in an attempt to inform attorney Gatley that he "wanted out of the settlement agreement." There does not appear to be any express denial in Nelson's papers that he signed the substitution of attorney form bringing attorney Lucien back into Nelson's case on January 5, 2011, or that he signed some form of settlement agreement in his lawsuit against the Hotel Parties. Still, Nelson contends that there is a wrong embedded in the

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9 Nelson's complaint initially included language indicating that he was suing for fraud pursuant to "Title 28, U.S.C., § 1655." Nelson later filed a paper stating that he was "removing" any reference to the United States Code, "without removing [his] claim for fraud itself."

10 On May 29, 2012, the trial court signed and entered a formal judgment striking Nelson's complaint against the Lewis firm and Gatley pursuant to the anti-SLAPP statute.

settlement agreement because the substitution of attorney form bringing attorney Lucien back into Nelson's case against the Hotel Parties was not filed in the trial court until January 12, 2011. The overriding claim by Nelson on appeal is his assertion that there were misdeeds of some form with finalizing the settlement agreement in his lawsuit against the Hotel Parties. With this framework in place, we turn to Nelson's appeal.

The Anti-SLAPP Statute

The anti-SLAPP authorizes a two-step procedure for striking a cause of action at the earlier stages of litigation when it is established that the cause of action was filed to chill the movant's constitutional rights of free speech and or to petition the government. (§ 425.16, subds. (a), (b).) In the first step, the court determines whether the movant has shown that a cause of action arises from so-called "protected activity." That is, from an act in furtherance of the movant's constitutional right to petition or free speech as defined in the anti-SLAPP statute. (§ 425.16, subds. (b)(1), (e).) The "principal thrust or gravamen" of a pleaded cause of action controls whether the statute's special striking procedure may be invoked at all against the cause of action. (See, e.g., *Martinez v. Metabolife Internat., Inc*. (2003) 113 Cal.App.4th 181, 188.) Once a court determines that the anti-SLAPP statute applies, the court then undertakes a second step analysis to determine whether the pleader has shown a probability of prevailing on his or her cause of action on the merits. (See § 425.16. subd. (b)(1); and see, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

An order granting or denying an anti-SLAPP motion is an appealable order. (§ 425.16, subd. (i).) Such an order is reviewed under the de novo standard of review, meaning the appellate court works through the statute's two-step procedure in the same examination as did the trial court. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

Analysis

We affirm the trial court's order granting the Lewis firm's anti-SLAPP motion. We do so because the Lewis firm showed that the anti-SLAPP statute applied to Nelson's causes of action in the first step, and Nelson failed to show in the second step that he had a probability of prevailing on his causes of action.

1. The First Step

Nelson's complaint establishes without question that he is suing the Lewis firm for damages allegedly caused by acts the firm committed while representing the Hotel Parties in Nelson's underlying lawsuit. Further, in his opening brief on appeal, Nelson expressly states that he is suing the Lewis firm based on "its representation of the defendants in an underlying case . . . ."

We start with the rule that it is the defendant's "activity" giving rise to an alleged liability which determines whether the anti-SLAPP statute applies in the first step. (See, e.g., *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1389.) In cases involving a plaintiff's causes of action alleged against an attorney arising from his or her representation of a client other than the plaintiff in an underlying matter, it is too well-settled to debate that the anti-SLAPP statute applies in the first step. As the Court of Appeal stated in *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141: "[I]f the plaintiff is a nonclient who alleges causes of action against someone else's lawyer based on that lawyer's representation of other parties, the anti-SLAPP statute is applicable to . . . such . . . claims." (*Id*. at p. 158.)

Dowling v. Zimmerman (2001) 85 Cal.App.4th 1400 is instructive. There, the plaintiff sued an attorney who represented the plaintiff's adversaries in a prior unlawful detainer action. (*Id*. at pp. 1408-1409.) The plaintiff alleged causes of action against the attorney for defamation, misrepresentation, and negligent and intentional infliction of emotional distress claiming the attorney made false representations and concealed material facts during the negotiation of a stipulated settlement. (*Id*. at pp. 1408-1409, 1418.) The Court of Appeal held that the complaint arose from statements the attorney "'made in connection with an issue under consideration or review by a . . . judicial body'" within the meaning of section 425.16, subdivision (e)(2). (*Id*. at p. 1420.)

GeneThera, Inc. v. Troy & Gould Professional Corp. (2009) 171 Cal.App.4th 901 is similar. There, the plaintiffs alleged causes of action for intentional interference with contractual relations and negligence claiming that an attorney for an adversary in a prior action made a settlement offer in the action in an attempt to create a conflict of interest

between the plaintiffs and their own lawyers. (*Id*. at p. 906.) In short, the plaintiff's causes of action arose from the defendant attorney's communication of an offer to settle a lawsuit. (*Id*. at p. 908.) We held that "[a]n attorney's communication with opposing counsel on behalf of a client regarding pending litigation directly implicates the right to petition and thus is subject to a special motion to strike." (*Ibid*.)

Nelson offers no meaningful argument in his briefs on appeal to refute that the anti-SLAPP statute was properly invoked by the Lewis firm to challenge his causes of action in the first step analysis.

2. The Second Step

The trial court found that Nelson did not show he had a probability of prevailing on his fraud and intentional infliction causes of action against the Lewis firm, both of which are based on the same foundational allegations concerning Lewis's representation of the Hotel Parties in Nelson's underlying lawsuit. We agree.

In his opening brief on appeal, Nelson explains that he is suing the Lewis firm "after . . . attorney Steven Gatley and attorney Darryl Lucien conspired together" to get his underlying case against the Hotel Parties dismissed. Nelson explains that the two attorneys accomplished the dismissal "by presenting fraudulent information [to the trial court] . . . with regard to attorney Darryl Lucien having legal authority" to finalize a settlement of Nelson's case against the Hotel Parties. Nelson tells us that "the settlement agreement which he signed with attorney Darryl Lucien is not the same settlement agreement that attorney Steven Gatley submitted to the [trial court in response to Nelson's] motion to set aside dismissal." Nelson claims attorney Gatley and attorney Lucien "[n]ever intended to protect [his] worker's compensation claims, even though they both promised to do so."

We find the trial court correctly determined that Nelson did not submit admissible evidence sufficient to sustain a favorable judgment in his case against the Lewis firm. A showing of a probability of prevailing under the anti-SLAPP statue means the plaintiff must make a prima facie showing of evidence that would sustain a judgment in his favor. (See, e.g., *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) In Nelson's case, the

Lewis firm's evidence in support of its anti-SLAPP motion showed that attorney Gatley delivered a settlement agreement document to a Lucien, who made representations that he had the authority to act as Nelson's counsel. Lucien returned a copy of the settlement agreement, with his and Nelson's signature, to Gatley. Gatley then released settlement funds to Lucien, who paid the money to Nelson. Finally, Nelson took the money.

In opposition, Nelson submitted "evidence" (or, more accurately, assertions) which, targeted his own counsel, and not the Lewis firm or Gatley. Nelson asserted that Lucien lied to the trial court in stating that a substitution of attorney form had been filed, when it had only been signed by Nelson and not yet filed. Further, Nelson asserted that he could not contact Lucien after he signed the substitution of attorney form. Nelson claimed that he called Lucien and told him he "wanted out" of the settlement, but Lucien said Nelson could not get out of it. According to Nelson, Lucien threatened Nelson and used scare tactics to get him to settle. Further, that Lucien assured him that his workers' compensations claims would not be affected by the settlement. Nelson also claimed that Lucien refused his request to "cancel" the settlement, failed to go over the settlement line-by-line with Nelson, and failed to send Nelson a complete copy of the settlement agreement for a number of months. Overwhelmingly, Nelson essentially asserts that his own counsel scuttled his case against the Hotel Parties, and then refused to take any corrective action to reinstate the case. As the trial court in Nelson's underlying case against the Hotel Parties accurately perceived when it denied Nelson's motion to set aside the dismissal in the case, Nelson's problems were with his own attorney, not with the Lewis firm.[11]

[11] We do not make any findings as to Lucien's liability to Nelson. We merely highlight that Nelson did not present any substantial evidence which would support a judgment on his causes of action for fraud and intentional infliction of emotional distress against the Lewis firm.

To the extent Nelson asserts that the Lewis firm, by attorney Gatley, "conspired" with attorney Lucien to put an end to Nelson's case against the Hotel Parties, Nelson has not pointed us to any evidence in the record having any tendency to show such a conspiracy.

For all of the reasons discussed, we find no error in the trial court's conclusion as to the second step analysis of the anti-SLAPP statute.

DISPOSITION

The judgment striking Nelson's complaint pursuant to the anti-SLAPP statute is affirmed. Each party to bear its own costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.